TR Usah ak Lutong & Ors v Lembaga Tabung Haji & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–160 OF 2009

B

SULAIMAN DAUD, APANDI ALI AND MOHTARUDIN BAKI JJCA

31 MAY 2012

C

Civil Procedure — Settlement — Prohibition of further claims — Plaintiffs accepting compensation to resolve their claims over land — Whether plaintiff could make further claims relating to compensation received

D

Native Law and Custom — Land dispute — Customary rights over land — Claim of inheritance of land from ancestors — Lands settled in 1870's by forefathers of longhouse dwellers — Dwellers given permits to clear land for planting and hunting — Whether native customary rights acquired over lands — Sarawak Land Code (Cap 81) ss 5(2)(ii), 10(3) & 44

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The plaintiffs were the residents of Rumah Usah longhouse in Sarawak. They brought this action on behalf of themselves and on behalf of all residents of the said longhouse claiming that their forefathers settled in that area some time in 1870's and their longhouse was formerly known as 'Rumah Remang'. On 24 April 1961 the Bintulu District Office had issued to the residents of Rumah Remang a permit under s 10(3) of the then Sarawak Land Code ('SLC') giving them the right to fell virgin jungle in that area. The plaintiffs, pursuant to the permit obtained, had felled and cleared the land within it for planting, hunting and etc. They believed that by reasons thereof, they would have had native customary rights ('NCR') over the said land. On or about 2 December 1996 a provisional lease was issued to the first and second defendants covering areas with the area under the permit. The plaintiffs alleged that the defendants had trespassed to their land by planting palm oil thereon. The dispute was resolved by the payment of compensation to seven people from the longhouse. The plaintiffs then filed an action claiming for various declaratory reliefs and for damages. The High Court dismissed the plaintiffs' claim and hence, this appeal. The issue which arose for determination was whether the permit gives rise to NCR over the said land.

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Held, dismissing the appeal with costs of RM10,000 to each respondents:

(1) The law on NCR over land has been laid down clearly in s 5(2) of the SLC which categorically specifies the various methods by which native customarily rights may be acquired. The cut-off date of 1 January 1958 as

provided in the proviso in s 5(2)(ii) of the SLC is the relevant law and as such the paintiffs could not have any right to the area, as claimed by them (see paras 21 & 23).

(2) Accordingly, whatever rights which they may have must be those 'rights' stated in the permit itself and those rights must be read with s 10(3) of the SLC under which the permit was issued. Pursuant to the provisions of s 10(3) of the SLC, any rights granted under the permit were subject to other laws regulating, inter alia, the taking of forest produce, such as the Forests Ordinance. Read with s 5(1) of the SLC, the land over which the permit was issued was undoubtedly state land (see para 24).

(3) Should the plaintiffs occupy or attempt to create NCR over land under the permit, they would have committed an offence under s 10(3) as the permit issued to them is only to fell virgin jungle or 'hutan tua'. Section 10(3) itself prohibits any attempt to create NCR upon such land; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 referred (see para 25).

(4) Section 10(3) provides for permit over interior area land. A permit under s 10(3) cannot be issued over reserved land. Therefore, the issuance of the permit to Rumah Remang should be considered as void ab initio. An invalid permit cannot be deemed as creating valid rights under the law. The said permit, did not, by reason of s 44 of the SLC confer any rights over the said land to the plaintiffs (see paras 29, 31–32).

(5) The plaintiffs had accepted from the first and third defendants a total sum of RM164,000 as compensation for resolving all their claims to rights under the permit. Having received such compensation, the plaintiffs could not therefore come to court with new or further claims, that were related to the compensation received (see para 34).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan penduduk rumah panjang Rumah Usah di Sarawak. Mereka membuat tindakan ini bagi pihak mereka dan kesemua penduduk rumah panjang yang mendakwa bahawa nenek moyang mereka telah menduduki kawasan tersebut sekitar tahun 1870 dan rumah panjang mereka dahulunya dikenali sebagai 'Rumah Remang'. Pada 24 April 1961 Pejabat Daerah Bintulu telah mengeluarkan permit kepada penduduk Rumah Remang di bawah s 10(3) Kanun Tanah Sarawak yang terdahulu ('KTS') yang memberikan mereka hak untuk menebang hutan dara di kawasan tersebut. Plaintif-plaintif, menurut permit yang diperoleh, telah menebang dan mengosongkan tanah di kawasan tersebut untuk penanaman, pemburuan dan sebagainya. Mereka percaya bahawa untuk sebab-sebab sedemikian, mereka akan mendapat hak adat anak negeri ('HAAN') terhadap tanah tersebut. Pada atau sekitar 2 Disember 1996 pajakan provisional telah dikeluarkan kepada defendan pertama dan kedua yang merangkumi kawasan bersama kawasan di

bawah permit tersebut. Plaintif-plaintif mendakwa bahawa defendan-defendan telah menceroboh tanah mereka dengan menanam kelapa sawit. Pertikaian tersebut telah diselesaikan dengan bayaran pampasan kepada tujuh orang daripada rumah panjang tersebut. Plaintif-plaintif kemudian memfailkan tindakan mendakwa untuk pelbagai relief deklarasi dan untuk ganti rugi. Mahkamah Tinggi menolak tuntutan plaintif-plaintif dan justeru, rayuan ini. Isu yang timbul untuk penentuan adalah sama ada permit tersebut mewujudkan NCR terhadap tanah tersebut.

Diputuskan, menolak rayuan dengan kos RM10,000 kepada setiap responden:

(1) Undang-undang mengenai HAAN terhadap tanah telah dinyatakan dengan jelas di dalam s 5(2) KTS yang mana secara kategori menetapkan pelbagai cara bagaimana hak adat anak negeri boleh diperolehi. Tarikh tutup 1 Januari 1958 yang dinyatakan di dalam proviso s 5(2)(ii) KTS adalah undang-undang relevan dan oleh demikian plaintif-plaintif tidak boleh mempunyai sebarang hak terhadap kawasan tersebut, seperti yang dituntut oleh mereka (lihat perenggan 21 & 23).

(2) Sewajarnya, sebarang hak yang mana diperolehi oleh mereka mestilah hak-hak yang telah dinyatakan di dalam permit tersebut dan hak-hak tersebut mestilah dibaca bersama s 10(3) KTS yang mana permit tersebut telah dikeluarkan. Menurut peruntukan s 10(3) KTS, mana-mana hak yang diberikan di bawah permit tersebut adalah tertakluk kepada undang-undang lain yang mana mengawal selia, antara lain, pengambilan keluaran perhutanan, seperti Ordinan Perhutanan. Dibaca bersama s 5(1) KTS, tanah di mana permit tersebut telah dikeluarkan tidak diragui adalah tanah negeri (lihat perenggan 24).

(3) Sekiranya plaintif-plaintif menduduki atau cuba untuk mewujudkan HAAN terhadap tanah di bawah permit tersebut, mereka akan melakukan kesalahan di bawah s 10(3) memandangkan permit yang dikeluarkan kepada mereka hanyalah untuk menebang hutan dara atau 'hutan tua'. Seksyen 10(3) tersendirinya menghalang sebarang cubaan untuk mewujudkan HAAN terhadap tanah tersebut; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 dirujuk (lihat perenggan 25).

(4) Seksyen 10(3) memperuntukkan untuk permit terhadap kawasan dalaman tanah. Suatu permit di bawah s 10(3) tidak boleh dikeluarkan terhadap tanah simpanan. Permit yang tidak sah tidak boleh dianggap sebagai mewujudkan hak-hak sah di bawah undang-undang. Permit tersebut, tidak, disebabkan oleh s 44 KTS memberikan sebarang hak terhadap tanah tersebut kepada plaintif-plaintif (lihat perenggan 29, 31–32).

(5) Plaintif-plaintif telah menerima daripada defendan pertama dan kedua jumlah sebanyak RM164,000 sebagai pampasan untuk menyelesaikan kesemua tuntutan mereka terhadap hak di bawah permit. Dengan menerima pampasan tersebut, plaintif-plaintif oleh itu tidak boleh datang ke mahkamah dengan tuntutan baru atau selanjutnya, yang berkaitan dengan pampasan yang diterima (lihat perenggan 34).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands & Survey, Miri Division & Anor [2005] 5 MLJ 305, CA (folld)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

Legislation referred to

Forest Ordinance (Cap 126)

Sarawak Land Code (Cap 81) ss 2, 5(1), (2), 2(a), (2)(ii), 10(3), 44

Appeal from: Suit No 22–08 of 2003 (BTU) (High Court, Bintulu)

Satinder Singh Sandhu (Sandhu & Co) for the plaintiffs/appellants.

Sim Hui Khuang (Lim Lip Sze and Fatmawaty bt Morshidi with him) (Reddi & Co) for the first and second respondents.

JC Fong (Dewi Rahmaz Majidi with him) (State Legal Counsel Sarawak) for the third and fourth respondents.

Apandi Ali JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court, Bintulu given on 28 April 2009, in an action commenced by the plaintiffs on behalf of themselves and those whom they represent, claiming, inter alia, a declaration that they had acquired and or created individual and communal native customary rights over an area ('the disputed area') within land described in para 6 of the amended statement of claim dated 23 November 2005.

[2] The High Court dismissed the claim with no order as to costs.

[3] On 22 February 2012, after hearing submissions by both parties, this court unanimously dismissed the appeal with costs of RM10,000 to each the

respondent.

THE FACTS OF THE CASE

[4] The plaintiffs are the residents of Rumah Usah, Ulu Sebungan, Sebauh, Sarawak and bring this action on behalf of themselves and on behalf of all residents of the said longhouse.

[5] The plaintiffs adduced evidence that their forefathers settled in Sg Sebungan Sebauh area some time in 1870's and their longhouse was formerly known as 'Rumah Remang' when it was under *Tuai Rumah* Remang ak Ejan.

[6] On 24 April 1961 the Bintulu District Office had issued to the residents of Rumah Remang a permit under s 10(3) of the Sarawak Cap 81 (Sarawak Land Code Chapter 81 (1958 Ed)) giving them the right to fell virgin jungle in Ulu Sebungan.

[7] The plaintiffs, pursuant to the permit obtained, had felled and cleared the land within it for planting, hunting and etc. They believed that by reasons thereof, they would have had native customary rights over the said land.

[8] On or about 2 December 1996 a provisional lease was issued to the first and second defendants; however part of the land covered by the said lease was overlapped with the area under the permit.

[9] The plaintiffs alleged that the defendants had trespassed to their land by planting palm oil thereon.

[10] The dispute was resolved by the payment of compensation to seven people from the longhouse who also executed some letter of discharge and disclaimer; which the plaintiffs argued that it was never explained to them and the payment was meant for the limited area only.

[11] The plaintiffs then filed an action in the High Court at Bintulu, claiming for various declaratory reliefs and for damages.

[12] The High Court dismissed the plaintiffs' claim with no order as to costs.

A THE ONLY ISSUE FOR DETERMINATION

[13] The only issue for this court to determine is whether the permit obtained by the plaintiffs under s 10(3) of the Sarawak Cap 81 ('SLC') gives rise to native customary rights over the said land?

B

ARGUMENTS BEFORE THIS COURT

By the plaintiffs

C

[14] In support of their argument, the plaintiffs had submitted that the permit, obtained by them, was issued by the Bintulu District Office; and it was within the objective mutual contemplation of both, the grantor of the permit and the longhouse inhabitants; since the latter obtain their livelihood from the land, that they would upon felling of the virgin jungle, were at liberty to occupy and cultivate the land.

D

[15] Thus the objective of the permit was to allow the inhabitants to acquire the native customary rights by one of the methods specified in s 5(2) of the SLC.

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[16] It is also in the light of the s 5(1) the existence of a permit under it is a precondition for the creation of native customary rights in the interior area land as from 1 January 1958.

F

[17] The plaintiffs also submitted that the Rajah's order and the laws on excessive use of land were not applicable in this case. Those laws were in force prior to the enactment of the Land Code. The said laws governed the native customary rights prior to January 1958; whereby this case was after the cut-off date.

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[18] The plaintiffs alleged that their NCR had been disregarded and/or their vested and/or accrued rights in the disputed area impaired by the wrongful issuance (without prior extinguishment of their NCR and payment of compensation) of two provisional leases over Lot 2 Block 4 Selezu Land District and Lot 2 Block 34 Kemena Land District ('collectively referred to as the said Provisional Leases'), to the first and third defendants (the first and third respondents in this appeal).

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[19] In para 7 of the amended statement of claim, the plaintiffs pleaded, inter alia, that they were issued with a permit by the district officer dated 24 April 1961 ('the permit') to create and to acquire native customary rights over that area of land in Ulu Sungai Sebungan on the whole of its left bank starting from its confluence with Sungai Balim upwards until its upper reaches. The permit stated as follows:

> Permit to fell virgin jungle
>
> 28 doors from Rumah Remang, Sebungan are hereby permitted under section 10(3) of the Land Code to fell hutan tua in the ulu Sebungan sa-belah kiri mudek from Nanga Balim to the ulu.

By the defendants

[20] The fourth and fifth defendants, on the other hand, argued that the said permit did not confer any native customary right over the said land; this is so because the said permit that was issued under s 10(3) of the Land Code. Section 10(3) reads as follows:

> Without prejudice to any law for the time being regulating the prospecting for minerals and mineral oils or the taking of forest produce, any native who, without a prior permit in writing from a Superintendent, occupies any Interior Area Land or fells or attempts to fell virgin jungle upon any such land or attempts to create customary rights upon any such land shall be guilty of an offence: Penalty, in the case of a first offence, a fine of one thousand ringgit, and, in the case of a second or subsequent offence, imprisonment for two years and a fine of five thousand ringgit.

[21] The law on native customary rights over land has been laid down clearly in s 5(2) of the Land Code (Sarawak Cap 81) which categorically specifies the various methods by which native customarily rights may be acquired, which are as follows:

(a) felling of virgin jungle and occupation of land thereby cleared;

(b) planting of land with fruit trees;

(c) occupation or cultivation of land;

(d) use of land for burial ground or shrines;

(e) use of land of any class for rights of way; or

(f) any other lawful method.

Provided that —

(i) …

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

[22] On this issue, we are guided by the case of *Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands & Survey, Miri Division & Anor* [2005] 5 MLJ 305 which the relevant portion at pp 314–315; reads as follows:

> [12] It will next be necessary to say something about native customary rights in Sarawak and how they are created or acquired. The law on the matter is presently embodies in sub-s (1) of s 5 of the Land Code which provides that as from January 1, 1958, native customary rights may be created in accordance with native customary law of the community or communities concerned by any of the methods specified in sub-s (2).
>
> [13] As can be seen, after January 1, 1958 no recognition is given to any native customary rights created after that date by any of the methods mentioned in s 5 unless a permit to do so under s 10 of the Land Code is obtained. The parties accept it that, and correctly in our view, the question whether in any particular case, native customary rights have been acquired prior to January 1, 1958, must be determined by the law in force immediately prior to that date.

[23] It is our judgment that the cut-off date of 1 January 1958 as provided in the proviso in s 5(2)(ii) of the SLC is the relevant law and as such the plaintiffs could not have any right to the area, as claimed by them.

[24] Accordingly, whatever rights which they may have must be those 'rights' stated in the permit itself and those rights must be read with s 10(3) of the Land Code under which the permit was issued. The rights accorded under the permit must be 'without prejudice to any law for the time being regulating the prospecting of mineral, oils or the taking of forest produce'. Therefore, from the clear and unambiguous provisions of s 10(3) of the Land Code, any rights granted under the permit are subject to other laws regulating, inter alia, the taking of forest produce, such as the Forests Ordinance. Read with s 5(1) of the Land Code, the land over which the permit was issued, is undoubtedly State Land.

[25] It is our judgment that although s 10(3) allows for a permit to be issued to a native to (a) occupy any interior area land, or (b) fell virgin jungle upon such land; or (c) or customary rights upon such land; the permit issued to the plaintiffs only entitled them to 'fell virgin jungle' implying that their rights were merely to take forest produce from the area under the permit and no more. In other words, should the plaintiffs occupy or attempt to create native customary rights over land under the permit, they would have committed an offence under s 10(3) as the permit issued to them is only to fell virgin jungle or 'hutan tua'. Section 10(3) itself prohibits any attempt to create customary rights upon such land.

[26] In our instant case, the plaintiffs claimed to have created and acquired NCR over the area under the permit by virtue of having that permit which was issued under s 10(3) of the Land Code. But neither the terms of the permit nor the provisions of s 10(3) allow the plaintiffs continuous occupation of the land. Clearing virgin jungle per se does not enable a native to create NCR. Without continuous occupation, how can there be any basis for customary rights over the said land? See *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555.

[27] It is clear that the permit allowed the natives only to fell 'hutan tua' ('old jungle/virgin jungle') implying that they were only to fell the trees. No right of farming or occupation or the 'creation of NCR' by the method specified in s 5(2)(a) ie by felling virgin jungle and occupation of the land thereby cleared was granted in the permit. Based on the terms of the permit, if they have attempted to create individual communal NCR over the area under the permit, they would have committed an offence under s 10(3) of the Land Code.

[28] Corollary to that, the permit issued to the plaintiffs does not enable the plaintiffs to create NCR over the land described in the Permit. On this ground alone, the High Court's judgment dismissing the plaintiffs' claim ought to be upheld and affirmed.

[29] We further note that s 10(3) provides for permit over interior area land. In this case, the disputed area were part of Similajau Forest Reserve which was *gazetted* under GN 1716 dated 11 December 1959. It is apparent that the forest reserve was constituted prior to the issuance of the permit to Rumah Remang which was only issued on 26 April 1961.

[30] As to what the interior area land is, s 2 of the Land Code provides the following definitions:

> 'Interior Area Land' means land not falling within any of the definitions of Reserved Land, Native Customary Land, Native Area Land or Mixed Zone Land;
>
> 'Reserved Land' means land –
>
> (a) …
>
> (b) comprised within a National Park constituted under the National Parks and Nature Reserve Ordinance, 1998 [Cap 27], or within a Forest Reserve, protected Forest or Communal Forest constituted under the Forest Ordinance [Cap 126 (1958 Ed.)].

[31] By the said definitions, it is clear that a permit under sub-s 10(3) cannot be issued over reserved land. Therefore, the issuance of the permit to Rumah Remang should be considered as void ab initio. An invalid permit cannot be deemed as creating valid rights under the law.

[32] Inter alia, the said permit, does not, by reason of s 44 of the Land Code confer any rights over the said land to the plaintiffs.

[33] Section 44 of the Land Code provides that:

> No person shall acquire any right or title against the Government by virtue of any adverse possession, unlawful occupation or occupation under temporary licence, and no right shall be acquired against the Government, save such right or title as may be lawfully granted under this Code.

[34] It is also noted that there is evidence that the plaintiffs had accepted from the first and third defendants a total sum of RM164,000 as compensation for resolving all their claims to rights under the permit namely for fruit trees and any other rights which we may possess (sic) the said permit, 'This is evidenced by the Letter of Discharge and Disclaimer dated 24 February, 1999'. Having received such compensation, the plaintiffs cannot therefore come to court to make any new or further claims, that were related to the compensation received.

CONCLUSION

[35] For the above reasons, we find that there is no merit in the appeal and accordingly we dismissed the appeal with costs of RM10,000 to each respondent.

Appeal dismissed with costs of RM10,000 to each respondent.

Reported by Kanesh Sundrum